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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RANDALL D. WHITE,

Petitioner,

V.

ILLINOIS,

Respondent.

On Writ of Certiorari to the
Appellate Court of Illinois, Fourth Judicial District

BRIEF OF AMICI CURIAE, THE VICTIM ASSISTANCE CENTRE, INC., AND JOHN B. HOLMES, JR., DISTRICT ATTORNEY OF HARRIS COUNTY [HOUSTON], TEXAS, JOINED BY THE YOUTH VICTIM/WITNESS PROGRAM, KID-PAC, JUSTICE FOR CHILDREN, HOUSTON POLICE FAMILY VIOLENCE UNIT, NATIONAL ORGANIZATION FOR WOMEN (HOUSTON AREA CHAPTER), GRANDPARENTS RAISING GRANDCHILDREN, AND THE ALLIANCE FOR THE RIGHTS OF CHILDREN IN SUPPORT OF RESPONDENT, THE STATE OF ILLINOIS

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BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

The Victim Assistance Centre, Inc. is a nonprofit corporation funded partly by Harris County [Houston], Texas, which offices in space provided by and works closely with the County. Its purpose is to lessen the trauma suffered by victims of crime and their families by providing emotional support, criminal justice system information, court accompaniment, referrals, crime victim compensation filing, parole information, reference to other organizations, and other services that prevent or lessen harm to victims and their families. Its responsibilities include cases in which child abuse, neglect, and sexual assault is charged. It has extensive practical experience in processes that will reduce potential harm to child victims and their families caused by the effects of the criminal justice system.

John B. Holmes, Jr. is the elected District Attorney of Harris County [Houston], Texas, with responsibility for the presentation of criminal cases to grand juries and juries. His responsibility includes cases involving charges of crime against children.

All other amici are organizations interested in bettering the lives of children who are victims of crime. For brevity, their descriptions are set out in the margin below.*

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case made by Respondent, the State of Illinois.

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* The Youth Victim/Witness Program addresses the needs of abused children and their families by providing a link to the criminal justice system, helping the family cope with the resulting issues, and enabling the child and family to participate in the legal process with the least amount of trauma.

KID-PAC is a political action committee whose purpose is to work for the election of officials who care about children and to work for the removal from office of those who do not. This determination is made through the organization's examinations of voting records and public record as well as through research, news reports and investigation.

Justice for Children is a child advocacy group with a primary focus on improvement of the governmental systems that affect children.

The Houston Police Family Violence Unit is a part of the Houston Police Department that investigates crimes related to violence in families.

The National Organization for Women (Houston Area Chapter) is a local chapter of a national organization dedicated to improvement of the status of women. Its purposes include monitoring the courts of Harris County and aiding and assisting other groups to elect judges more attuned to its interests, including its interest in minimizing child abuse.

Grandparents Raising Grandchildren provides support for grandparents who are trying to obtain temporary or permanent custody of their grandchildren due to child abuse. It also provides support for grandparents with such custody and it works for legislative changes affecting the circumstances of such grandparents.

The Alliance for the Rights of Children focusses on enacting federal laws that provide independent rights to children under the law, before the courts.

SUMMARY OF ARGUMENT

It is expected that the brief of Respondent, the State of Illinois, will thoroughly discuss case law and its application to the evidence. This brief therefore does not seek to repeat Respondent's arguments, although amici curiae are generally in agreement with those arguments and wish to express support for them. Instead, this brief deals with the scientific literature of child abuse and with issues of policy.

1. *Defendant's struggle to "distinguish" co-conspirators' statements (as in United States v. Inadi) is unscientific and unsound.* Child abuse closely resembles conspiracy. The literature shows that perpetrators generally use conspiracy-like secrecy techniques such as threats and manipulation (exactly as defendant did here). The literature also shows that the psychological effects often are enough to repress the conspiracy-like secret of child abuse into adulthood—and even then, many victims are unable *even to recall* the abuse without therapy. The likelihood of conspiracy-like repression increases with the length of time after the event. Further, the literature shows that spontaneous reports of abuse by children have exactly the kind of reliability that the common law ascribed to them. Thus, spontaneous declarations of child abuse, close in time to the event, display indicia of trustworthiness and necessity that are just as strong as those of co-conspirators' statements.

2. *Defendant's inflexible approach to requiring necessity is not a workable means of preventing severe trauma to child victims.* The vast majority of children are abused by adults in continuing positions of authority and trust. They usually are fathers, brothers, uncles or mothers' boyfriends (as in this case). Therefore, defendant's unsupported statement that the child victim has a "continuing *adversary* relationship" with the abuser, is unscientific and unsound. Furthermore, children harmed by testifying are those vulnerable to denial, low self-esteem, repression, and inability to trust adults—and these are exactly the harms that invariably are induced by vigorous or "successful" cross-examination. Most importantly, the litera-

ture shows that we are quite unable to predict *which* children will suffer long-term harm into adulthood even though abuse is closely correlated with dysfunctions such as borderline personality disorder. Ironically, children who seem to be "tough" and "strong" enough to "testify without harm" may be precisely those who are *most* at risk, since denial and repression are part of the pathology of child abuse. The effect is like that of carcinogens "causing" cancer—we cannot tell *which* exposed person will develop the disease, although all are at enhanced risk.

3. *Defendant's approach is inherently illogical and would create nonsensical results.* By (erroneously) arguing that he was convicted "solely" by hearsay, defendant seeks to convert the issue into a kind of ersatz "sufficiency-of-the-evidence" test—but this approach would be entirely inappropriate for considering individual items of evidence. In addition, if the child did testify, defendant's reasoning would lead to the anomalous result of excluding her declarations. Defendant's multiple-procedure approach, requiring the judge to experiment with the most intrusive methods before accepting less traumatic ones, would actually aggravate the harm to children who turn out to be the most vulnerable. Perhaps most importantly, there was nothing to prevent cross-examination here; the State actually produced the child, made her available, and made reasonable efforts to call her. Defendant could have cross-examined her but made the tactical choice not to.

ARGUMENT AND AUTHORITIES

I. DEFENDANT'S EFFORT TO DISTINGUISH THE CO-CONSPIRATOR EVIDENCE ADMITTED IN *UNITED STATES V. INADI* IS UNPERSUASIVE AND UNSCIENTIFIC.

Defendant argues that the present case "is entirely different from the relationship between co-conspirators." This argument is based on defendant's unsupported and unscientific assertion that "[u]nlike co-conspirators, who are partners in crime, the [child victim] and the defendant are involved in a *continuing adversary relationship*." Petitioner's Brief 21 (emphasis added).

Defendant is forced to take this position because in *United States v. Inadi*, 475 U.S. 387 (1986), this Court upheld admittance of a co-conspirator's statements even without a showing of unavailability. Therefore, defendant must struggle to distinguish co-conspirators' statements. But defendant's purported "distinction" on the ground of "continuing adversary relationship" is both scientifically unsound and irrelevant to the controlling legal principles.

A. *The hearsay exceptions here are legally like the treatment of co-conspirators' statements in that they are "traditional" and "firmly rooted" exceptions.*

Defendant conspicuously refuses to compare the "traditional," "firmly rooted" nature of the exceptions here to the treatment of co-conspirators' statements. *Cf.* Petitioner's Brief 20-21 (containing defendant's arguments about *Inadi* and co-conspirators' statements). The "firm root[ing]" of these exceptions strongly supports the admittance of the evidence here irrespective of unavailability, even though defendant avoids so recognizing. Amici will not further brief this issue, since it is anticipated that the State of Illinois will thoroughly cover it; the traditional nature of the exceptions merits this concise mention, however, because of defendant's failure to deal with it.

B. *The State of Illinois should not be forced to accept defendant's unscientific assertion that a violated child stands in a "continuing adversarial relationship" to the father, brother, uncle, mother's boyfriend, or other trusted adult who has abused her. Instead, Illinois should be allowed to recognize that suppression and repression occur in this situation precisely as they do in conspiracies.*

The scientific literature shows that child abuse takes place in circumstances that closely mirror the suppression and repression of a conspiracy. For example, the vast majority of abused children are violated not by strangers, but by adults in positions of authority and trust, who exploit the victims' continuing loyalty and tendency toward secrecy. The clear majority, in

fact, are abused "by family members, most frequently by fathers . . . and brothers . . . ." *See* Bryer, Nelson, Miller & Krol, *Childhood Sexual and Physical Abuse as Factors in Adult Psychiatric Illness*, 144 AM. J. PSYCHIATRY 1426, 1427 (1987); *see also* Swett, Surrey & Cohen, *Sexual and Physical Abuse Histories and Psychiatric Symptoms Among Male Psychiatric Outpatients*, 147 AM. J. PSYCHIATRY 632, 633 (1990). Boyfriends of mothers, as in this case, also are frequent sexual and physical abusers.

Furthermore, as in this case, the trusted adult often threatens the child either implicitly or (with surprising frequency) explicitly and graphically. Ayalon, *The Daughter as a Sexual Victim in the Family*, in A. CARMI & M. ZIMRIN, CHILD ABUSE 135-36 (1984). These threats, together with the relationship to the authoritative adult, usually induce both fear and repression-based shame, which motivate the child to preserve the "secret"—precisely as co-conspirators do. Thus, "[l]ove and tenderness, or emotional blackmail, characterize [the incestuous family member's] approaches toward [the child victim]." *Id.* The abused child's mother usually is a passive but knowing participant in the preservation of this malignant secret, just as a participant in a conspiracy might be. *Id. See generally* J. HERMAN, FATHER-DAUGHTER INCEST (1981). Sometimes, the mother actively works to suppress evidence of abuse, in which event the situation not only resembles a conspiracy; it *is* a conspiracy.

C. Contemporaneous declarations of abuse closely resemble co-conspirators' statements with respect to the necessity rationale of Inadi, because the scientific literature shows that the suppression, repression and secrecy deliberately induced by the trusted adult often last even into the victim's adulthood.

Finally, the victim's motivations toward repression of the conspiracy-like secret survive long after the discovery or termination of the abuse. In fact, many child-abuse survivors continue to keep the secret even after growing to adulthood, because they have "repressed or suppressed memories of the abuse." Bryer et al., *Childhood Sexual and Physical Abuse as Factors in Adult Psychiatric Illness*, 144 AM. J. PSYCHIATRY 1426, 1430 (1987). "The memories emerge only after a period of contact with sensitive clinicians." *Id.* The repression actually increases over time. *See* Yates, *Should Young Children Testify in Cases of Sexual Abuse?*, 144 AM. J. PSYCHIATRY 476, 477-78 (1987). Thus, an attempt to force disclosure of the secret upon a conflicted child in a hostile environment predictably will produce profound resistance by the child—or an "emotional hiatus of some sort," as the defense attorney at trial cynically labelled the result in this case.

Defendant seeks to distinguish *Inadi, supra*, by citing this Court's statement, 475 U.S. at 395, that:

> Conspirators are likely to speak differently when talking to each other in furtherance of their own illegal aims than when testifying on the witness stand.

Defendant's "distinction" is unpersuasive.[1] As the literature demonstrates, this rationale fits the abused child equally well. She is "likely to speak differently" when making a spontaneous utterance close in time to the abuse, than when the repression induced by the abuser causes an "emotional hiatus of some sort" while the child victim is "testifying on the witness stand." In short, the threats, coercion, multiple participants, joint

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1 Defendant also argues, erroneously, that an abused child is "[u]nlike co-conspirators" in that she assertedly is "uniquely accessible to the prosecution." Petitioner's Brief at 21. This unsupported statement simply is wrong. Any prosecutor who has tried child abuse cases knows that abused children are among the most *inaccessible* witnesses to the prosecutor; often, they are accessible instead to the family member or other trusted adults who have abused them. Alternatively, they may often be unable to testify because of events similar to the "emotional hiatus" in this case. The defendant frequently induces repression and secrecy by threats and manipulation, precisely as happens in conspiracies, for the very purpose of making the witness inaccessible. *See generally* the authorities cited in this section of this brief.

enterprise, secrecy, and continued repression that characterize the admittance of co-conspirators' statements, also support admittance of child victims' spontaneous utterances. *Cf. Dutton v. Evans*, 400 U.S. 74 (1970) (statement made *after termination* of object of conspiracy, by co-conspirator implicating defendant, held admissible because during "concealment" phase).

D. Spontaneous declarations of child victims are at least as trustworthy, under the scientific literature, as co-conspirators' statements.

The literature about child victims demonstrates the genius of the common law in evolving the traditional, firmly rooted hearsay exception for spontaneous declarations. Specifically, the literature shows that such spontaneous utterances of child victims have strong indicia of trustworthiness and non-fabrication, just as the common law judges originally surmised.

This is not to say that fabrication does not occur in some unusual cases involving allegations of child sexual abuse. In a small minority of instances, fabrication does occur. The point, however, is that fabrication rarely occurs in the "uncoached," contemporaneous utterances of child victims; instead, the majority of fabrications result from suggestion by an adult (and even then, fabrication is relatively rare). Thus, the literature gives the following illustration of one of these unusual child abuse allegations, one that was not spontaneous:

> . . . In one case, for example, a mother asked her 5½-year-old daughter, "Don't you remember all the times your daddy rubbed your tushy? You *don't*? It was when we lived in the house down on the lake and you thought it was such a funny game and he liked to do it so much; oh, you *must* remember that." After several additional variations on the same theme, the little girl thought that the father had rubbed her "tushy". . . .

Yates, *Should Young Children Testify in Cases of Sexual Abuse?*, 144 AM. J. PSYCHIATRY 476 (1987). Thus, defendant's reasoning might lead to exclusion of non-spontaneous hearsay statements resulting from extensive suggestion or "coaching," but this is a factor not present in spontaneous declarations or statements to treating physicians.

On the other hand, reports of abuse by children are extremely likely to be true, if they are spontaneous and close to the event. When the statement is "uncoached," and it describes an act improbable for a child but probable for an adult abuser (as in this case), the literature shows that the indicia of trustworthiness are at their highest. *Cf.* Yates, *supra*, at 477 (describing childrens' capacity to recall and relate accurately in absence of suggestion). These are precisely the kind of statements that are covered by the common law exception for spontaneous declarations.

In conclusion, defendant's efforts to distinguish *Inadi* are directly contrary to the literature. *Inadi* in fact furnishes a close parallel to this case, and the spontaneous declarations of children about abuse possess similar characteristics of necessity and trustworthiness to those of co-conspirators.

II. DEFENDANT'S STRICT APPROACH TO REQUIRING INDIVIDUALIZED PROOF OF "NECESSITY" IS NOT A WORKABLE MEANS OF PREVENTING SEVERE TRAUMA TO CHILD VICTIMS.

A. A "necessity" approach based upon inferences about long-term trauma should not be forced upon the State of Illinois, because the individual nature and degree of long-term trauma, lasting into adulthood, depends upon future events that are unknown and unknowable.

There is an extremely high correlation between child abuse and adult psychiatric disorders. *See* Swett et al., *Sexual and Physical Abuse Histories and Psychiatric Symptoms Among Male*

Psychiatric Outpatients, 147 AM. J. PSYCHIATRY 632, 635 (1990); Bryer et al., *Childhood Sexual and Physical Abuse as Factors in Adult Psychiatric Illness*, 144 AM. J. PSYCHIATRY 1426, 1429-30 (1987); Steele, *Notes on the Lasting Effects of Early Child Abuse Throughout the Life Cycle*, 10 CHILD ABUSE & NEGLECT 283 (1986); Carmen, Ricker & Mills, *Victims of Violence and Psychiatric Illness*, 141 AM. J. PSYCHIATRY 378, 382-83 (1984); *see generally* M. STRAUS (ed.), ABUSE AND VICTIMIZATION ACROSS THE LIFE SPAN (1988); A. CARMI & H. ZIMRIN, CHILD ABUSE (1984).

Unfortunately, however, very little is known about the mechanism or predictability of such disorders.

> We do not know nearly enough about the long-term effects of maltreatment during the early formative years of life. With very few exceptions, we have not followed abused infants and children from early childhood through to adolescence and adult life stages.

Steele, *Notes on the Lasting Effects of Early Child Abuse Throughout the Life Cycle*, 10 CHILD ABUSE & NEGLECT 283 (1986). In fact, it is doubtful that such prediction *ever* can be made. *Id.*

The defendant's response to these overwhelming evidences of long-term effect, lasting into adulthood, is to force an "adversarial testing" of the child. Petitioner's Brief 17. This "adversarial testing" of an abused child is precisely opposite from the treatments that are thought to minimize the effects of child abuse. Among other difficulties, abused children suffer from repression, denial of the abuse, lack of self worth, helplessness, and inability to trust adults. *See, e.g.*, J. LEEHAN & L. WILSON, GROWN-UP ABUSED CHILDREN 3 (1985). Defendant's model of "adversarial testing" would have an authoritative adult, the judge, forcing the child to submit to "adversarial testing" by another adult, the defense lawyer; and that "adversarial testing" of the child would be done in precisely

the way that would most severely aggravate the repression, denial of the abuse, lowered self esteem, helplessness and inability to trust adults that are the primary products of abuse. *Id.*

In fact, what the child needs after abuse is reaffirmation of self worth, reaffirmation of trust, and rejection of the denial and repression. J. LEEHAN & L. WILSON, *supra*, at ch. 1. Ironically, therefore, it seems that the best predictor of lack of harmfulness to the child would be lack of a successful cross-examination. Conversely, defendant's "necessity" reasoning would lead to the anomalous conclusion that the only case in which the judge should permit cross-examination of an abused child would be that in which the cross-examination would be least likely to be successful.

The following shows how the literature treats successful cross-examinations of truthful, abused children:

> Children who have been hurt by [testimony and cross-examination] cite the confusion and sense of failure attendant upon a "successful" cross-examination, guilt because they participated in the crime but were not punished, guilt from the harm done to a valued family member, terror from confronting the accused, exhaustion after hours of testimony, separation from family members who were not permitted in the courtroom, fear that they would be found guilty and put in jail, fear of the strange courtroom setting, and horror at reliving events through testimony. A common concern of young children is that the accused (who may have threatened to kill them if they tell) will jump on them in the courtroom. Many children who are the victim of incest and accuse their own parent fear that the parent will never forgive them.

Yates, *Should Young Children Testify in Cases of Sexual Abuse?*, 144 AM. J. PSYCHIATRY 476, 478 (1987). Thus, the

"necessity" theory put forward by defendant would inherently depend, not upon the makeup of the child, but upon whether the cross-examination was likely to be "successful." The most harmful combination would be a truthful child who faces a skillful defense attorney motivated to conduct a "successful" cross-examination. It would be inappropriate to have a judge decide questions of admissibility on the basis of such considerations, and it is submitted that Illinois should be free to reject defendant's model of necessity.

More importantly, it is scientifically unsound to imagine that a judge, psychotherapist, or anyone else can predict the long-term effects, into adulthood, of vigorously cross-examining a truthful abused child. For example, among the adult conditions caused by childhood sexual abuse are delinquency, drug abuse, and a condition known as "borderline personality disorder." *See* Steele, *supra*; K. WHITE, J. SNYDER, R. BOURNE & E. NEWBERGER, TREATING CHILD ABUSE AND FAMILY VIOLENCE IN HOSPITALS 37-40 (1989). Borderline personality, in particular, has been shown in very recent years to be heavily correlated with childhood sexual abuse. *See, e.g.*, J. KROLL, THE CHALLENGE OF THE BORDERLINE PATIENT: COMPETENCY IN DIAGNOSIS AND TREATMENT 41-42 (1988). However, the factors that combine to "cause" borderline personality in one abused child, and that fail to produce this disorder in others, are unknown and probably unknowable. Thus,

> "[w]e do not know enough about the influence which variables such as age of onset and duration of assaults, violence and viciousness, subtle factors of intimidation, seduction, rewards and sympathy, surrounding circumstances, family constellation, constitutional factors, sources of support, and peer relationships have upon development of or protection from borderline traits."

Id. "Information on the long-term effects of sexual abuse is extremely limited, and no systematic longitudal data on childhood victims of sexual abuse exist." K. WHITE et al., *supra*, at 40. Most of the probable factors are in the future anyway, and thus are unknowable at the time of abuse or reporting. The factors probably include genetic factors. *See* Stone, *Constitution and Temperament in Borderline Conditions: Biological and Genetic Explanatory Formulations*, in 1 THE BORDERLINE PATIENT 253 (J. Grotstein, M. Solomon & J. Lang eds. 1987). It is extremely far-fetched to assume that a judge would go into the genetic makeup of an abused child in order to determine whether she can testify without effects lasting into adulthood, but given the scientific literature, that is precisely what the defendant's model of "necessity" would call upon the judge to do. Illinois should not be forced to accept defendant's strict, inflexible, and unworkable criterion of "necessity."[2]

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2 *Coy v. Iowa*, 487 U.S. 1012 (1988), and *Maryland v. Craig*, 497 U.S. ____ (1990), do not require Illinois to use defendant's inflexible unavailability theory in this case. *Coy* held that the modern solution of screening the victim from seeing the defendant could not be used. *Craig* held that closed circuit testimony required "an adequate showing of necessity." Significantly, neither *Coy* nor *Craig* concerned a "firmly rooted" exception to the hearsay rule. This case, by way of contrast, involves hearsay exceptions that are traditional and were "firmly rooted" at the time of adoption of the confrontation clause.

Furthermore, neither *Coy* nor *Craig* should be interpreted to require the judge to make unattainable findings of individualized future harm, across the board, in every case. *Coy* holds that the State may create hearsay exceptions where "necessary to further an important public policy." 487 U.S. at 1021. *Craig* holds that such a public policy may be made out by "the important state interest in preventing trauma to child witnesses in child abuse cases." 111 U.S. at ____. Neither *Coy* nor *Craig* requires individualized findings in all cases; certainly neither requires individualized showings of unavailability across the board, in cases of firmly rooted hearsay exceptions. Above all, *Coy* and *Craig* should not be extended to require the trial judge to do the impossible. For the reasons given in this section of this Brief, that is the effect of defendant's argument.

Defendant's necessity approach is analogous to deciding to expose a child to a carcinogen unless the child can prove that she, individually, will contract cancer from it. The problem is that some exposed persons will contract cancer, others will not, and all that can be said is that exposure to carcinogens is correlated with cancer. A variety of environmental, viral, behavioral and genetic considerations also influence who gets cancer and who does not, but their impact is too speculative to predict. The same is true of cross-examination about child abuse. Child abuse is epidemic in this country, and it clearly is closely associated with adult personality disorders statistically; yet the severity of resulting disorders cannot be made the basis of accurate *individual* prediction lasting into the child's adulthood.

B. A uniform rule such as that used by Illinois is preferable to a "rule," such as defendant's proposed "necessity" requirement, that actually would depend more upon idiosyncratic differences among trial judges than upon differences among cases.

The model of necessity offered by defendant implies that the trial judge would make a finding that the child was unavailable due to the short or long term effects of testifying and being cross-examined. But this "finding" could not be made without prediction of the kind described in the preceding section of this Brief. Since such a prediction cannot be made on an individual basis, it would instead be made on the basis of the idiosyncratic beliefs or preferences of the trial judge. Illinois should not be forced to accept such a rule.

In fact, since denial and repression are part of the pathology, it is precisely those children who *least* appear to suffer ill effects who may, ironically, be *most* at risk. In other words, if the child "seems" to be "tough," "strong," or able to suffer through what defendant cynically calls "adversarial testing," the probable reason is that the child actually is suffering from denial or repression of the effects of abuse. Instead of being among those most likely to survive the "adversarial testing" intact, as she may seem to the unscientific observer such as a judge, this

"tough" child actually is among those *most* likely to be harmed. Thus, there is great danger that such a finding would frequently be diametrically opposed to reality. Illinois should not be forced to make a finding of necessity under such conditions. Instead, a uniform, traditionally-rooted rule of evidence—such as the rule allowing spontaneous utterances, without reference to whether a child or adult is testifying—should be a permissible choice for Illinois.

III. DEFENDANT'S PROPOSAL IS INHERENTLY ILLOGICAL AND WOULD CREATE NONSENSICAL RESULTS.

A. Defendant's argument actually depends upon a sufficiency-of-the-evidence attack, but this approach should not be used to decide admissibility of the evidence at issue.

Defendant repeatedly (and erroneously)[3] alleges that he was convicted "exclusive[ly]" or "solely" by extrajudicial statements. Petitioner's Brief at 14, 24, 25. This argument actually is an attack on the sufficiency of the evidence (although it is a factually erroneous one, here) and it should not be used to decide the admissibility of the evidence at issue.

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3 Defendant's attacks on the "exclusivity" of this hearsay evidence and upon the asserted lack of "corroboration" (*see* Petitioner's Brief 11) are not only irrelevant; they are wrong. The statements of the child were not the only evidence, and they were corroborated. For example, the child victim's babysitter testified to the child's scream that awakened her, followed by her seeing the defendant exiting the victim's room. Defendant then gave her a thoroughly incredible explanation of why he was in a place where he had no legitimate purpose for being. The child's mother, Mrs. Grigsby, testified to the physical manifestations of defendant's choking of the child victim and of his sexual attack, which included red marks and disturbances in the neck and vaginal areas. Defendant was not convicted "exclusively" on the basis of extrajudicial statements, nor was there any lack of "corroboration."

There is a difference between questions of sufficiency of evidence and questions of admissibility of evidence. The sufficiency of evidence must be evaluated according to a reasonable doubt standard. It will be rare that proof beyond a reasonable doubt can be based solely upon extrajudicial statements of a child victim, unless the evidence is unusually consistent and compelling (as it is in this case). That question, in any case, is entirely separate from the question whether an individual item of evidence should be *admitted*, and defendant's efforts to confuse the two issues by stressing the alleged "exclusivity" of the evidence (or even that this evidence was "primarily" what supported conviction) should be resisted.

What would happen if there were other evidence in the record, which was independently sufficient for conviction? Then, would this defendant be arguing that the "other" evidence somehow would change the effect of the confrontation clause, so that the child's declarations suddenly would become admissible? If so, does the "other" evidence have to be overwhelming? Or (as seems more consistent with a necessity rationale), should hearsay be admissible if the "other" evidence is marginal, or even insufficient for conviction? The answer, of course, is that the rest of the evidence of guilt is irrelevant to defendant's argument. Actually, defendant *must* be arguing (and indeed, he obviously *is* arguing) that hearsay declarations such as these are *never* made admissible by other evidence, no matter how much independent proof of guilt the record might contain. Since that is the argument, it is completely beside the point whether the record evidence is "exclusively" or "solely" or "primarily" hearsay, and defendant's reliance on these concepts is disingenuous.

Furthermore, notwithstanding defendant's rhetoric, it actually is quite common for some elements of a criminal offense to be proved "exclusively" or "solely" by hearsay. For example, a weapons offense may require proof that the weapon travelled in interstate commerce. This "commerce" element normally would be proved by business records, which are hearsay. The prosecution should be free to rely on business records in such

a case, even if by chance there happens to be an available live witness who once worked for a freight company and who remembers transporting the individual weapon at issue. Likewise, in a prosecution for attempted assassination of the President of the United States, the fact that the victim was President should be provable by documentary hearsay or by judicial notice that is based upon such documents. (Indeed, no one can know such a "fact" without having once learned it from hearsay, not even the President himself.) It often is entirely reasonable for the law to rely "exclusively" on hearsay, as these and an infinite variety of other examples would show.

More fundamentally, however, defendant's confusion of the *sufficiency* of the evidence, with its *admissibility*, is illogical and would produce anomalous results. As McCormick observed, "a brick is not a wall." See C. McCORMICK et al., EVIDENCE 543 (3d ed. 1984). To build a wall, one must lay bricks one by one. If the laying of an individual brick were conditioned upon the entire wall being built first, no brick could ever be set. Likewise, defendant's effort to measure the *admissibility* of evidence by its exclusivity, or *sufficiency* to prove the point by itself, would defeat the possibility that any evidence could ever be properly assessed for admissibility.

Perhaps defendant could have argued that an accused person should not be convicted solely by hearsay, or by hearsay without corroboration. A state could adopt such a procedural rule if it chose to. And some hearsay-based convictions, even if based on admissible hearsay, could be attacked as unconstitutional if (for example) the evidence as a whole did not amount to proof beyond a reasonable doubt. But defendant did not (and factually could not) raise either of these sufficiency arguments in this case. His efforts, now, to insert them into arguments about admissibility should not succeed, because they simply are irrelevant to admissibility.

B. There was nothing to prevent cross-examination of the victim by defendant in this case; the State actually produced her, made her available, and made reasonable efforts to call her.

Even if defendant's necessity analysis were compelled by the Constitution, it should not cause reversal here, because defendant was not denied the right or practical ability to cross-examine the child victim in this case. Obviously, the defendant made a tactical choice not to call her for cross-examination. Defendant concluded that the danger of her testifying so as to strengthen the State's evidence was too great, and that the odds of acquittal were greater if defendant simply accepted the evidence as it was.[4] This tactical choice should not obscure the fact that the witness was produced, was present, and could have been called for cross-examination by defendant. Defendant's statement that the child "was not produced for cross-examination" is a misleading play upon semantics.

In fact, defendant's argument would stand the confrontation clause on its head. If the child were a fugitive hidden by her parents (as sometimes happens), or if she were provably so likely to be harmed by cross-examination as to justify a finding to that effect, defendant apparently would recognize her "unavailability" and accept the evidence—even though there could be no cross-examination. But in this case, the defendant's right and practical ability of cross-examination were completely preserved by the production of the victim in the courtroom. The State should not be made worse off by its having produced the victim, to be called for cross-examination by the defense if the defense so chooses, than it would be if it had been unable to produce her at all.

Furthermore, the evidence shows that the State made reasonable efforts to call the child victim in this case. Trial counsel's admission that she did not testify because of an

4 It may be that the child would have refused to speak, or would testify to lack of memory. But in that event she would have been unavailable. Illinois properly could admit her prior statements in that event *even* under defendant's unduly strict theory. *See California v. Green*, 399 U.S. 149 (1970).

"emotional hiatus of some sort" obviously meets the standards of the confrontation clause cases. E.g., *Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965).

C. Defendant's reasoning would lead to the anomalous result that, if the victim testified, her statements would be excluded.

Defendant's strict approach to "necessity" would exclude spontaneous utterances by a witness unless that witness were shown to be "unavailable." But if the witness actually testifies, she is not unavailable. Thus the consequence of defendant's reasoning is that if the victim were unavailable, her statements could be admitted, but if the victim actually testified and were subjected to cross-examination, her statements would be excluded. Illinois should not be forced to accept such an anomalous result.

D. Defendant's multiple-method approach to preventing severe trauma, in which the judge is forced to guess at the proper procedure, would be unworkable in practice.

So inflexible is defendant's "necessity" approach that defendant would have the judge finely calibrate the procedure to be used, guessing at the precise procedure that would most preserve the right of cross-examination while avoiding harm to the child. The judge thus could not use traditional, firmly rooted hearsay rules of uniform application, at all. Instead, defendant argues, "if a child will not suffer severe emotional trauma when testifying by a closed-circuit television, that procedure should be followed." Petitioner's brief 25. But since the judge in any event cannot reasonably determine that a child will not be harmed, will not exhibit borderline personality disorder in adulthood, and will not "suffer severe emotional trauma" from testifying, the pinpoint precision demanded by defendant is even more clearly unattainable.

Presumably, defendant would have the judge first exhaustively examine the child, and then try various of the more intrusive procedures to determine whether she "will suffer severe

emotional trauma." It is precisely this sort of process that justifies scientists' conclusion that "[i]n some cases, procedural assault is added to sexual assault." Yates, *supra*, at 476, paraphrasing Bauer, *Preparation of the Sexually Abused Child for Court Testimony*, 11 BULL. ACAD. PSYCHIATRY LAW 287 (1983). This kind of experimentation would use "lesser" procedures such as closed-circuit television only when the child actually exhibits indicia of "severe emotional trauma" from more intrusive methods. In such an event, the effort to determine the harm not only would be unsuccessful because of the inaccuracy of long-term prediction; in addition, by repeatedly subjecting the child to a sequence of procedures, the court would *ipso facto* cause precisely the harm that is sought to be avoided.

CONCLUSION

The incidence of child abuse is rampant. Its correlation with adult psychiatric disorders and long-term dysfunction is clearly established. But the pinpoint precision in case-by-case determination of harm demanded by defendant is impossible. Among the factors known at the time to the judge, the very success or lack thereof in the cross-examination is probably the best predictor of harm. But most importantly, whether the victim will succumb to borderline personality disorder or other dysfunctions depends upon undetermined (and undeterminable) future events. All that can be said with confidence is that abused children will suffer harm if cross-examined in an effort to deny the abuse, but we are completely unable to identify which children will, and which will not, suffer long-term effects from this continuation of denial and repression of the offense. In fact, children who seem most "strong" and "tough" are precisely those who may be most at risk. For all of these reasons, defendant's strict approach to "necessity" in the form of "unavailability" of child victims, based upon strict showing of individualized harm on a case-by-case basis, is unworkable.

At the same time, contrary to defendant's assertions, the spontaneous declaration exception serves precisely the necessity

and truth-insuring function that the common law inferred it would insure. In this respect, and in the repression and secrecy that surrounds it, spontaneous reports of abuse by children resemble the co-conspirators' declarations deemed properly admitted in *United States v. Inadi, supra*.

Further, defendant's arguments are illogical and would produce anomalous results. The argument that hearsay evidence was "exclusive" and was not "corroborated" is factually inaccurate; but more importantly, these arguments seek to use a sufficiency-of-the-evidence approach to determine the admissibility of evidence—an approach that would lead to the exclusion of virtually any piece of evidence, considered by itself. Defendant's argument would have the anomalous consequence of excluding the evidence even when the child victim is produced, and even when she testifies. More importantly, there was no denial of confrontation in this case because there was nothing to prevent cross-examination of the victim by defendant; the State actually produced her in court, made her available, and made reasonable efforts to call her (desisting only because of what defense counsel himself labelled an "emotional hiatus"). Defendant's proposal for a multiple-method approach to preventing severe trauma, in which the judge must guess at the proper procedure, is unworkable, both because the finely graded judgment about which process is sufficiently unintrusive that it will avoid long-term trauma cannot be made, and because the investigation of the child necessary to determine this issue would cause precisely the kind of harm that the inquiry is designed to avoid.

The decision of the Illinois court below should be affirmed.

Respectfully submitted,

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